BUILD TEX CONSTRUCTION SDN BHD

v.

MAJLIS AGAMA ISLAM MELAKA

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 1-12-33-2003]
9 DECEMBER 2004

CONTRACT: *Deposit/Commitment fee - Forfeiture - Defendant vendor forfeited commitment fee when plaintiff developer disagreed to carry out development at costs valued by government department - Whether development subject to valuation by government department - Whether contract concluded between parties - Whether parties agreed fee not refundable - Whether forfeiture not unconscionable*

The plaintiff/appellant together with a joint venture company applied to the defendant/respondent to develop the defendant's land in the state of Melaka. The plaintiff's application was approved by the Chief Minister's office in Melaka *vide* a letter ('the letter of approval') that contained *inter alia* two conditions. Firstly, that the costs of development should be the same as the value of the defendant's land, valued by the government's valuation department. Secondly, that the plaintiff pay a commitment fee of RM100,000 to the Melaka Islamic Religious Council which was not refundable. The plaintiff accepted the offer and paid the commitment fee of RM100,000. The defendant obtained the valuation of the land at RM12.7 million from the government's valuation department. The plaintiff then appointed two private valuers who valued the defendant's land at RM8.2 million and RM9.4 million respectively. In fact, the letter of approval did not provide for any private valuation as such. It followed that the plaintiff applied to the Melaka Chief Minister to reduce the value of the land as per the private valuation. The defendant did not agree to this and consequently revoked the letter of approval and forfeited the commitment fee. The plaintiff demanded for the refund of the commitment fee but the defendant refused. That led to the plaintiff's action against the defendant that was dismissed and which brought this appeal.

Held (dismissing the appeal):

[1] The plaintiff accepted the defendant's offer and the defendant fulfilled the condition pertaining to the government valuation. Both parties had therefore fulfilled the conditions in the letter of approval. Accordingly, the plaintiff's acceptance was absolute and unqualified. Section 7(a) of the Contracts Act 1950 was of no assistance to the plaintiff. In so far as the commitment fee and the development of the defendant's complex were concerned, there was a concluded contract. Further, the parties agreed that the commitment fee was not refundable in the event the plaintiff did not proceed with the development according to the valuation by the government's valuation department. No fault, blame or unreasonable conduct could possibly be attributed to the defendant in order to render the forfeiture of the commitment fee unconscionable. (p 192 a-b)

Case(s) referred to:

Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy [1996] 3 CLJ 393 HC ***(refd)***
Cendekia Candranegara Tjiang v. Yin Kum Choy & Ors [2002] 4 SLR 48 ***(refd)***
Chan Yuet Chun v. Martego Sdn Bhd [1996] 2 BLJ 431 HC ***(refd)***
Eckhardt Marino GMBH v. Sheriff Mahkamah Tinggi Malaya di Seremban & Ors [2001] 3 CLJ 864 CA ***(foll)***
Ee & Lim Advocates v. Gin Nam Development Corpn Sdn Bhd & Anor [1992] 3 CLJ 1575; [1992] 2 CLJ (Rep) 371 HC ***(refd)***
Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 CLJ 1 SC ***(dist)***
Kapital Raya Sdn Bhd lwn. Bloomville Corporation Sdn Bhd [1996] 4 CLJ 510 CA ***(dist)***
New Selangor Plantations Sdn Bhd v. Talam Management Services Sdn Bhd [1996] 4 CLJ 94 ***(dist)***

Legislation referred to:

Contracts Act 1950, s. 7(a)

For the plaintiff - Suria Kumar; M/s Suria Kumar & Co
For the defendant - Zalina Zainuddin; M/s Mohd Mohtar & Co

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant-plaintiff ("the plaintiff") against the decision of the learned sessions court judge ("the trial judge") who had on 15 August 2003 dismissed the plaintiff's claim for, *inter alia,* RM100,000.

Finding Of Facts

After a full trial, the trial judge's finding of facts revealed that the plaintiff together with a joint venture company TH Properties Sdn. Bhd. had applied to the defendant in order to develop the defendant's land held under Lot Nos 33, 34, 35, 260 and 261, with a total acreage of 5.4 acres in the mukim of Bukit Baru, Melaka. The plaintiff's application has been approved by the Melaka Chief Minister's office *vide* letter dated 27 February 2001 ("the letter of approval") which contained, *inter alia,* the following conditions:

> 2(ii) ... Kos projek kompleks MAIM ... yang dibangunkan hendaklah bersamaan dengan nilai tanah ... yang akan dinilai oleh Jabatan Penilaian Kerajaan.
>
> (iii) Syarikat hendaklah menjelaskan bayaran komitmen berjumlah RM100,000.00 kepada Majlis Agama Islam Melaka. (Bayaran ini tidak dikembalikan.)
>
> [My translation:
>
> 2. (ii) The costs of developing the project for the MAIM complex shall be the same as the value of the land to be valued by the Valuation Department of the Government.
>
> (iii) The company shall pay the commitment fee of RM100,000 to the Melaka Islamic Religious Council. (This fee is not refundable.)]

Vide plaintiff's letter dated 23 May 2001, the plaintiff has accepted the offer by fulfilling condition 2(iii) of the letter of approval pertaining to the payment of RM100,000 as the commitment fee ("the commitment fee"). Meanwhile, the defendant has fulfilled condition 2(ii) thereof by obtaining the valuation of the land from the Valuation Department of the Government. The Department valued the land at RM12.7 million, while the valuation of the two private valuers appointed by the plaintiff arrived at the figures of RM8.2 million and RM9.4 million respectively. The letter of approval did not provide for any condition for private valuation as such.

The plaintiff *vide* letter dated 28 August 2001 applied to the Melaka Chief Minister to reduce the value of the land as per the valuation of the private valuers, but the defendant did not agree.

Vide letter dated 10 September 2001, the defendant notified the plaintiff of the revocation of the letter of approval and forfeited the commitment fee.

Consequently, the plaintiff *vide* letter dated 20 September 2002 demanded the refund of the commitment fee from the defendant, which the defendant has refused. Hence, this action by the plaintiff against the defendant in the sessions court, and now this appeal before me.

Refund

Mr. Suria Kumar, learned counsel for the plaintiff, submitted that the plaintiff is entitled to the refund of the commitment fee, relying on s. 7(a) of the Contracts Act 1950 ("s. 7(a)"); *New Selangor Plantations Sdn. Bhd. v. Talam Management Services Sdn Bhd* [1996] 4 CLJ 94; *Ee & Lim Advocates v. Gin Nam Development Corpn Sdn. Bhd. & Anor.* [1992] 3 CLJ 1575; [1992] 2 CLJ (Rep) 371, *Chan Yuet Chun @ Chan Oi Lin (Berniaga Sebagai Wing Sun Trading Co.) v. Martego Sdn. Bhd.* [1996] 2 BLJ 431; *Eckhardt Marino GMBH v. Sheriff Mahkamah Tinggi Malaya di Seremban & 2 Ors* [2001] 3 CLJ 864; *Kapital Raya Sdn Bhd lwn. Bloomville Corporation Sdn Bhd* [1996] 4 CLJ 510; *Abdul Rahim bin Syed Mohd v. Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Rohana bt Tan Sri Datuk Hj Roshan as Interveners)* [1996] 3 CLJ 393 HC; *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 CLJ 1 SC; *Cendekia Candranegara Tjiang v. Yin Kum Choy & Ors* [2002] 4 SLR 48 HC Singapore.

Defendant's learned counsel Ms Zalina bt Zainuddin responded that the issue before the trial judge and in this appeal concerns the payment of the non-refundable commitment fee which the defendant has correctly forfeited when the plaintiff did not carry out the development of the defendant's complex.

In my judgment, the question for determination in this appeal may be formulated as follows:

> Where the plaintiff has agreed and paid a non-refundable commitment fee of RM100,000 to the defendant for the purposes of carrying out the development of the defendant's complex, at the costs to be valued by the Valuation Department of the Government, is the plaintiff entitled to the refund of the commitment fee from the defendant when the plaintiff has failed or refused to carry out the development at the costs as valued by the Valuation Department of the Government?

In deference to the enormous efforts expended by plaintiff's learned counsel, it is appropriate for me to analyse the authorities cited by him in order to determine the extent of support which may be generated therefrom. In doing so, I must emphasise that the foremost factors which I must focus would be the trial judge's finding of facts as unfolded in the narrative above.

Section 7(a) provides that in order to convert a proposal into a promise, the acceptance must be absolute and qualified, which in my view is a question of mixed fact and law.

In *New Selangor Plantations, supra*, the sole issue to be determined was whether there was a concluded contract to allow the entry and removal of a private caveat. The facts there revealed that the plaintiff's letter has accepted the increase in the price of land but provided for "such terms and conditions as shall be determined and advised by our solicitors in transactions of this nature". On the facts and applying, *inter alia*, s. 7(a), I held that the acceptance was not absolute and unqualified and that there was no concluded contract to give rise to any caveatable interest. As the facts are distinguishable, my judgment there can afford no assistance to the plaintiff herein.

Section 7(a) was also applied in:

1. *Ee & Lim Advocates, supra*, where the second defendant's application to Public Finance Bhd was approved "subject to certain terms and conditions" which remained unfulfilled, and Haidar J (later CJ (M)) held that there was no approval;

2. *Chan Yuet Chun, supra*, where the plaintiff's letter has set out the terms for the defendant to accept, by signing and returning the duplicate thereof, which the defendant did not do. Kamalanathan Ratnarn, JC (later J) held that the plaintiff's letter remained nothing more than an offer; and

3. *Abdul Rahim, supra*, where a memorandum of understanding was signed by the plaintiff who did not sign a sale and purchase agreement. Visu Sinnadurai J (as he then was) held that there was no contract.

On the facts available in and the law applicable to the aforesaid three cases, I am of the view that they do not lend any support to the contention presented for the plaintiff.

In *Kapital Raya, supra*, the respondent purchaser ("the purchaser") offered to purchase a piece of land belonging to the appellant vendor ("the vendor"). The offer was made subject to certain terms and conditions concerning, *inter alia*, the payment and refund of deposit bearing the words "subject to contract". The execution of the sale and purchase agreement was agreed to be postponed twice. The vendor had refused to postpone execution for the third time and forfeited the deposit. The purchaser claimed for the refund thereof. The purchaser's application for summary judgment was allowed by both the learned Judicial Commissioner and the Court of Appeal, as the phrase "subject to

contract" meant that the parties were still in the midst of negotiations and that they did not intend to be bound until a formal contract is exchanged. The facts in the instant appeal did not reveal a similarity of facts. Further, the issue for determination in the Court of Appeal is different from that before me.

In *Kam Mah Theatre, supra,* the Federal Court dealt with the issue of whether a document in the form of a letter addressed to the respondent's legal firm, agreeing to sell certain pieces of land to the respondent constituted a valid and binding agreement for the purpose of obtaining specific performance and concluded that there was no contract in existence as the document was dependent upon the signing and approval of a formal contract, which the parties were still negotiating. Again the facts were different from those in the instant appeal.

The issue before the Court of Appeal in *Eckhardt Marine, supra,* was whether a valid and binding contract had been concluded between the appellant and the first respondent. The facts there were that the first respondent who had arrested a motor vessel had put up the same for sale. The appellant offered to purchase the vessel on the first respondent's terms subject to appellants' two conditions which were met and the sale of the vessel was approved by the judge of the High Court, whereupon the appellant became obliged to pay the balance of the purchase price within the stipulated time, but the appellant had failed to do so and its deposit was forfeited. The appellant applied unsuccessfully to the High Court for the release of its deposit. The Court of Appeal dismissed the appeal as there was a valid and binding contract and hence the deposit was rightly forfeited.

The facts in the instant appeal bear a somewhat striking similarity to the facts in *Eckhardt Marine, supra,* and so I am of the view that the Court of Appeal's decision militates against the plaintiffs argument.

Cendekia, supra, the issue was whether the memorandum of understanding (MOU) entered into between the parties was a binding final agreement. Pursuant to the MOU, the plaintiff paid a sum of RM462,800 as non-refundable earnest money for the transaction ie, the plaintiff's purchase of the first defendant's assets, but through no fault of the plaintiff, no formal agreement was signed by the parties who could not resolve their differences. MPH Rubin J of the Singapore High Court allowed the plaintiff's claim to recover the earnest money.

Reverting to the finding of facts before the trial judge, particularly both the parties' fulfilment of the conditions in the letter of approval *viz* the plaintiff's acceptance of the defendant's offer and the defendant's fulfilment of the condition pertaining to the Government valuation, I am of the view that the plaintiff's acceptance is absolute and unqualified. I am therefore unable to see how s. 7(a) is of any assistance to the plaintiff. In so far as the commitment fee and the development of the defendant's complex are concerned, I hold that there has been a concluded contract.

Upon a true construction of condition 2(iii) in respect of the payment of the commitment fee, I am of the view that the parties hereto have agreed that the commitment fee was not to be refunded in the event that the plaintiff did not proceed with the development of the defendant's complex according to the valuation of the Valuation Department of the Government and that unlike the facts in *Cendekia, supra,* in the instant appeal, no fault, blame or unreasonable conduct could possibly be attributed to the defendant in order to render the forfeiture of the commitment fee unconscionable.

Conclusion

On the foregoing grounds, the answer to the question for determination is in the negative. I therefore hold that the trial judge has arrived at the correct decision which I hereby affirm, with the result that the plaintiff's appeal is dismissed with costs.